Office-Supreme Court, U.S.
FILED
APR 23 1981
ALEXANDER L. STEVAS,
CLERK

80-1922

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1980

DONNA B. GRIER, Petitioner

vs.

HAROLD BROWN, et al

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DAVID T. LOPEZ
David T. Lopez & Assoc.
Counsel for Petitioner

3935 Westheimer
Suite 202
Houston, Texas 77027
(713) 965-9240

QUESTIONS PRESENTED

1. Does the decision in Teamsters sanction the continuation of pre-1964 Civil Rights Act practices, other than seniority, which have a present discriminatory effect?

2. Does military service by a National Guard civilian technician, which is separately compensated, exempt the civilian assignment from the provisions of the Equal Pay Act?

INDEX

Opinions Below.....2

Jurisdiction.....2

Questions Presented.....3

Statutes Involved.....3

Statement of Case.....3

Reasons for Granting Writ.....5

Appendix A

Judgment of the U.S. Court of Appeals for the 5th Circuit..... A-1

Petition for Rehearing.....A-2

Judgment of the U.S. District Court for the Southern District of Texas.....A-3

Appendix B

42 U.S.C. § 2000e-2(h).....B-1

29 U.S.C. § 206(d)(1).....B-2

TABLE OF CASES

International Brotherhood of Teamsters vs. United States, 431 U.S. 324 (1977).....5,7,8,9,

Corning Glass Works vs. Brennan. 417 U.S. 188, 197 n. 12 (1974).....10

Schlesinger v. Ballard, 419 U.S. 498 (1975).....10

Frontiero vs. Richardson, 411 U.S. 677 (1973).....10

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1980

No. _____

DONNA B. GRIER, Petitioner

vs.

HAROLD BROWN, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DONNA B. GRIER, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered in the above entitled case on December 30, 1980.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit and the judgment of the United States District Court for the Southern District of Texas, on which the appellate judgment was based, are printed in appendix A hereto. Neither was reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 30, 1980. A timely petition for rehearing was denied on January 23, 1981. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the decision in Teamsters sanction the continuation of pre-1964 Civil Rights Act practices, other than seniority, which have a present discriminatory effect?

2. Does military service by a National Guard civilian technician, which is separately compensated, exempt the civilian assignment from the provisions of the Equal Pay Act?

STATUTES INVOLVED

The statutes involved are 42 U.S.C. § 2000e-2(h) and 29 U.S.C. § 206(d)(1). The pertinent text is printed in appendix B hereto.

STATEMENT OF CASE

Petitioner is a woman employed as a civilian technician by the Texas Air

National Guard. Repeatedly, at various times during her long tenure of service, she has been assigned to perform jobs which would be classified in pay at a much higher rate if performed by a technician who also is enlisted in the military component. Petitioner was unable to join the military component at the time that she was employed as a civilian technician because of a then existing policy prohibiting the enlistment of females. The policy was discontinued when the 1964 Civil Rights Act sex discrimination prohibitions were made applicable to National Guard civilian technicians.

Jurisdiction in the court of first instance specifically is provided by 42 U.S.C. § 2000e-5(f)(3), as to the claim under the 1964 Civil Rights Act,

as amended, and by 29 U.S.C. § 216(b), as to the claims under the Equal Pay Act.

REASONS FOR GRANTING WRIT

1. The court of appeals decision conflicts with the applicable decisions of this Court.

The decision of the Fifth Circuit adopted the trial court decision.

On the basis of this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the trial court held that the National Guard "had no legal obligation to eliminate every lingering effect of discrimination which was legal at the time it was practiced." App. A-15.

Teamsters was a case in which a bona fide seniority system, in place at the time the 1964 Civil Rights Act

became effective, was alleged to have a present discriminatory effect. This Court took note of the provisions in 42 U.S.C. § 2000e-2(h) which sanctions different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system.

This Court, however, specifically reiterated its earlier holding that facially fair practices are unlawful if they continue the effects of prior discriminatory employment practices.

> One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in Griggs: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status

> quo of prior discriminatory employment practices," 401 U.S. [424] at 430, 28 L.Ed. 2d 158, 91 S. Ct. 849.
>
> Were it not for § 703(h), the seniority system in this case would seem to fall under the Griggs rationale.

Teamsters, supra, 431 U.S. at 349.

Initially, the trial court erred, ash shown above, in finding that Teamsters frees the employer from any obligation to avoid present effects of past discriminatory practices, other than seniority.

Additionally, however, the court found that no present discriminatory effect could be proved because there was not any proof that there were qualified females who would have enlisted in the military component of the Texas Air National Guard if they had been permitted to do so. App. A- 14.

Such an absolute denial of relief in the absence of applications by members of the discriminatorily excluded class also is contrary to this Court's holding in Teamsters. As this Court held, such a prohibition "could thus put beyond the reach of equity the most invidious effects of employment discrimination -- those that extend to the very hope of self realization." 431 U.S. at 367.

The court found as fact that at the time the petitioner became employed by the Texas Air National Guard she was precluded from joining the military component because of her gender. The court also found that the petitioner cannot be paid at higher grades, under existing policy of the Guard, because she is not a member

of the military component. Under those facts, a proper application of Teamsters would require that relief be granted, and that the case be remanded for the sole purpose of determining appropriate relief.

2. Whether holding a military position by a National Guard civilian technician permits discrimination in pay which otherwise would be proscribed by the Equal Pay Act is an important question of federal law which has not been, but should be, settled by this Court.

The court found that the petitioner, female, was performing work equal to that for which males were compensated at a much higher rate. The court found an exemption to the Equal Pay Act provisions on the basis of the military membership of the males,

which made them subject to mobilization.

The exceptions to the Equal Pay Act are ordinarily construed against any employer seeking to assert them, Corning Glass Works v. Brennan, 417 U.S. 188, 197 n. 12 (1974).

While in general, there are policy considerations suggesting that the judiciary should abstain from interference with military decisions, it is clear that invidious, gender-based employment discrimination can rise to constitutional dimensions and be subjected to judicial scrutiny. See, for example, Schlesinger v. Ballard, 419 U.S. 498 (1975), Frontiero v. Richardson, 411 U.S. 677 (1973).

In essence, National Guard civilian technicians may hold two jobs, one civilian and one military. The

holding of a military job by a civilian technician should no more permit wage disparity based on gender than would be the case where a male employee of a private concern chooses to subject himself to military mobilization by joining his local National Guard unit.

FOR THE FOREGOING REASONS THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

David T. Lopez
Attorney for Petitioner
3935 Westheimer - Suite 202
Houston, Texas 77027
(713) 965-9240

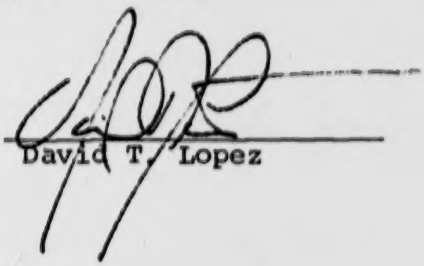
OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

CERTIFICATE OF SERVICE

I certify that on this the 22nd day of April, 1981, a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served on the attorney involved in this proceeding by placing same in the United States mail, postage prepaid, addressed to his last known address as follows:

Robert E. Kopp, Esquire
Acting Director, Appellate Staff
Civil Division
United States Department of Justice
Washington, D.C. 20530



David T. Lopez

DTL/af
4/23/81

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

No. 79-2578

DONNA B. GRIER, Individually and as representative of a class of all past, present, and future female National Guard Technicians employed by the National Guard or Texas Air National Guard,

Plaintiffs-Appellants,

versus

HAROLD BROWN, Secretary of the Defense, ET AL.,

Defendants-Appellees.

Appeal from

the United States District Court

for the Southern District of Texas

(DECEMBER 30, 1980)

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

PER CURIAM:

Affirmed on the basis of the opinion by District Judge Finis E. Cowan dated March 8, 1979.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-2578

DONNA B. GRIER, Individually and as representative of a class of all past, present, and future female National Guard Technicians employed by the National Guard or Texas Air National Guard,

Plaintiff-Appellant,

versus

HAROLD BROWN, Secretary of the Defense, ET AL.,

Defendants-Appellees.

Appeal from

the United States District Court

for the Southern District of Texas

JANUARY 23, 1981)

Before AINSWORTH, CHARLES CLARK and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Robert A. Ainsworth, Jr.
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

DONNA B. GRIER,)

Plaintiff)

v. CIVIL ACTION

DONALD RUMSFELD, et al.,) No. 76-H-1521

Defendants)

David T. Lopez, Houston, Texas

for Plaintiff

Richard Parker, Assistant United States Attorney, Houston, Texas

for Defendant

MEMORANDUM OPINION,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Basic Issue and Finding

The issue in this case is: Has plaintiff proved by a preponderance of the evidence that she is a victim of sex discrimination or that she is a victim of violation of the Equal Pay

Act. The undersigned has concluded that plaintiff has not sustained her burden of proof on either theory.

Factual Background

Plaintiff is a talented, dedicated, loyal, long-time employee of the Texas Air National Guard as a supply clerk.

At the time she commenced her employment with the Texas Air National Guard, women were not permitted to join the Texas Air National Guard. A significant issue, in the undersigned's analysis, is whether the plaintiff has established by a preponderance of the evidence that she would have become a member of the Air National Guard in 1962 even had she been legally permitted to do so. The evidence on this point is conflicting.

On the one hand, the plaintiff is a dedicated, patriotic, conscientious woman who undoubtedly would have

been very pleased, in some respects, to have become a member of the Texas Air National Guard. In addition, she was and is an ambitious lady anxious to advance in her profession. She undoubtedly could have perceived, and would have perceived in 1962, that her chances for advancement would be much better as a member of the Air National Guard than as a non-member. In addition, the plaintiff has testified that in 1962 she could have passed a physical examination to join the Texas Air National Guard. Although this is a non-medical, non-expert, opinion which must, to some degree, be based upon speculation and conjecture, the court nevertheless gives it some weight and would assume that there is at least a possibility (although not established

as a probability) that Donna B. Grier could have passed the physical in 1962 to become a member of the Air National Guard.

The factors on the other side of the balance, however, appear to the court more persuasive. First, in 1962, Mrs. Grier, a happily married woman, was the mother of a seven-year old boy. The evidence also establishes that in 1978 she is the mother of two young women who are members of the Texas Air National Guard. The evidence is not clear as to exactly when these young women were born, but it is manifest that in 1962 Mrs. Grier was the mother of at least one small child, and either had two other small children or was aware of the prospect of having more children. Mrs. Grier has testified that one of the reasons she did not join the Air National Guard after 1972

was that she had minor children. This same impediment existed in 1962. Second, Mrs. Grier testified that by 1971 when women became eligible to join the Texas Air National Guard, she could not have passed the physical because she was, by 1971, overweight. The court does not believe that it can legitimately assume or find that Mrs. Grier in 1962 could have passed the physical examination necessary to become a member of the Texas Air National Guard. There is no competent evidence that she could have done so. Proof of this fact would be difficult, but possible, through the testimony of Mrs. Grier's physicians, her medical records, and testimony of a physician familiar with the physical requirements for admission to the Texas Air National Guard in 1962. No proof of

this nature has been submitted.

Bearing in mind, therefore, that the burden of proof on all contested issues of fact remains upon Mrs. Grier, the court is unable to find conscientiously that Mrs. Grier would have joined the Texas Air National Guard in 1962 for the following reasons:

1. Her family commitments militated against her placing herself in a position where she would have been susceptible to mobilization; and

2. There is no competent proof to satisfy the court, by a preponderance of the evidence, that Mrs. Grier in 1962 could in fact have passed the physical examination.

It could be argued that plaintiff's inability to establish by a preponderance of the evidence that she would have joined

the Air National Guard in 1962 makes further inquiry and analysis unnecessary; however, Mrs. Grier's obvious sincerity and good faith makes more complete analysis of her case desirable.

In 1962, and at the present time, the Texas Air National Guard does have some civilian employees who are non-members of the Guard. The number is small. The reason for this situation is that those responsible for the management of the Air National Guard attempt to use their best paid civilian employee slots to create a cadre of full-time employees who devote all of their working hours to the Texas Air National Guard, and who also attend meetings and summer camps, and who will provide a skeleton of experienced, fully ready personnel in the event of mobilization. Eighty-five percent of all civilian employees

in the Texas Air National Guard, at all material times, have been members of this "cadre" of civilian employees who are also members of the Texas Air National Guard and who would be available to act as a skeleton and backbone of the organization in the event of mobilization. The undersigned specifically holds that there is a manifest and compelling "business" and national defense reason why the better paying civilian positions in the Air National Guard should be held by persons who are members of the Air National Guard and thus susceptible to mobilization.

From time to time, however, over the years local managers have had the option to hire a very limited number of civilian employees who are not also members of the Air National Guard. Formerly, a man would not be employed

as a civilian unless he was willing to join and was qualified, physically and otherwise, to join the Texas Air National Guard. Accordingly, most, if not all, civilian employees who were not members of the Texas Air National Guard over the years have been women. Mrs. Grier is one of these women.

It could be persuasively argued that the Texas Air National Guard's policy over the years has actually discriminated against men -- not women. For example, at the time Mrs. Grier went to work for the Guard in 1962, a man probably could not have obtained her job, if because of family commitments, or physical incapacities, he was unable to become a member of the Air National Guard. Generally speaking, as the court understands the evidence, only women were employed in positions

like that which Mrs. Grier was employed to fill. Obviously there were, in the labor force, men who for one reason or another -- such as inability to pass the physical, or family commitments-- were not able to become members of the Air National Guard. A man having these disabilities would not have been hired in Mrs. Grier's position in 1962, and thus if the Air National Guard has discriminated, it has discriminated against men -- not women. Mrs. Grier's position today is absolutely no different from that of a man who became a civilian employee of the Air National Guard in 1962 but who because of family commitments, or physical incapacity, did not become a member of the Air National Guard.

Plaintiff went to work as a supply clerk, and while she has held

many jobs in the supply function, she has basically continued to function as a supply clerk. As indicated above, she is an extremely conscientious, dedicated, intelligent and hard-working woman. The supply function, according to testimony, is consistently understaffed. The Texas Air National Guard, like most military units, is constantly subjected to reorganizations because of personnel changes, new weapons systems and other developments. For obvious reasons, therefore, a stable, intelligent, permanent employee like Mrs. Grier is invaluable, and will inevitably perform work which is extremely valuable and responsible.

The circumstances described above have created situations in which Mrs. Grier, on many occasions during her career, has performed jobs which are actually more responsible than the paper description of

her position might indicate. The rigid policy of the Air National Guard is to reserve the better paying jobs for members of the Air National Guard who are subject to mobilization. This policy, therefore, has created a situation in which a person like Mrs. Grier, who is not a member and who cannot become a member of the Air National Guard, can never advance beyond a G-5 level. On many if not most of the occasions during the last few years, the work she has been performing would be compensated at a higher wage rate, somewhere in the range of G-6 to G-8, if she were a member of the Air National Guard. The situation is clarified by reference to a specific position, i.e., the "Nors monitor" job.

One of the highly responsible jobs which plaintiff has performed over the last few years has been that of "Nors

monitor." The Nors monitor is responsible for making certain that the unit at all times has on hand certain critical airplane parts, which if not available, can result in the inoperability of the unit's aircraft. The person performing the Nors monitor job, if a member of the Air National Guard, would normally be compensated in the classification of G-6 to G-8. Mrs. Grier has performed this job on many occasions over extended periods of time and her compensation is set at the level of a G-5. The question then becomes: Is she being required, or has she been required to perform equal work for unequal pay?

Although this court recognizes, acknowledges and appreciates the extremely valuable contribution which Mrs. Grier makes every day to the Texas Air National Guard, this court cannot conclude that the facts above

create a situation in which Mrs. Grier does equal work for unequal pay for the following reason:

The member of the Texas Air National Guard who performs the Nors monitor function, may, in one sense, perform the same work as does Mrs. Grier, but in another sense there is a real difference. The difference is that the member of the Air National Guard who performs the Nors monitor job is also, in effect, on a 24-hour a day, seven days a week, 365-days a year standby. The guard member is constantly susceptible to mobilization; Mrs. Grier is not. This susceptibility to mobilization is a critical difference. Mrs. Grier and the Texas Air National Guard member who is working as a Nors monitor may do the same functional work Monday through Friday, but they

do not have the same job. This is true because the Texas Air National Guard member is subject to risks, hazards, potentialities of inconvenience and disruption of his or her personal life to which Mrs. Grier is not subject.

Equal Pay Act

That statute commonly known as the Equal Pay Act of 1963, Public Law 88-38, is codified at 29 U.S.C. § 206(d)(1), and the pertinent language of the statute is as follows:

> No employer having employees subject to any provisions of this section shall discriminate...between employees on the basis of sex, by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the oppo-

site sex in such establishment for equal work on jobs the performance of which require equal skill, effort and responsibility and are performed under similar working conditions, except where such payment is made pursuant to ...
(iv) a differential based on any other factor other than sex;...

The section does not afford the plaintiff in this cause any basis for relief because even in a situation where Mrs. Grier performs functionally the same task as does a member of the Guard, she is not performing the work under similar working conditions because the susceptibility to mobilization is a highly relevant and material working condition. In addition, the difference is based on a

factor other than sex in that the differential is based upon the fact that the Air National Guard member is susceptible to mobilization and Mrs. Grier is not.

Civil Rights Act of 1964

The pertinent portion of the Civil Rights Act of 1964, Public Law 88-352. codified at 42 U.S.C. §2000e-16(a) states, in its pertinent part, that:

> (a) Discrimination prohibited
> All personnel actions affecting employees or applicants for employment ... military departments, as defined in Sec. 102 of Title V, U.S. Code ... shall be made free from any discrimination based on ... sex ...

For the reasons stated herein under Factual Background and in the Specific Findings of Fact, the undersigned is

persuaded that the personnel action relating to Mrs. Grier has been taken without any discrimination based on sex.

The relevant Title VII provision is 42 U.S.C. §2000e-16. See Jones v. Texas Air National Guard, 584 F.2d 104 (5th Cir. 1978). Public Law 88-352, Title VII, Sec. 717 was added by amendment in March of 1972. It would appear therefore, that the Air National Guard's policy of excluding women prior to 1971, and at the time Mrs. Grier was employed, was not at the time an illegal employment practice. The question then arises as to the extent to which the defendant has the obligation under law to remove the effects of pre-Act discrimination. The inquiry must be whether or not the defendant's practices since 1972

carry forward "the effects of former discriminatory practices..." See Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980, 983 (5th Cir. 1969). The court specifically finds that even if it could be established that the defendant's present practices carry forward the effects of past discrimination, this individual plaintiff has not established that she was the victim of such a practice. As indicated above, this individual plaintiff has not borne the burden of proof with reference to the question of whether or not she was a victim of a prior discriminatory practice.

Thorough analysis demands, however, that the question be asked: Would plaintiff have a case if she could demonstrate that in 1962, she

would have joined the Air National Guard had she been permitted to do so and that she could have met all requirements.

In analyzing the problem from this point of view, the undersigned has attempted to apply the general analysis approved by the Fifth Circuit in Local 189 United Papermakers, supra. The inquiry therefore would appear to be whether or not Mrs. Grier has been denied promotions which she would have received but for her sex, by virtue of post-Act discrimination. The court cannot conclude that Mrs. Grier would have received promotions but for her sex. The factor which has limited Mrs. Grier's advancement in her employment is not her sex, but the fact that she is not a member of the Air

National Guard. Her situation is exactly the same as that of a male who went to work for the Air National Guard in 1962 but because of physical incapacity or family commitments, did not become a member of the Air National Guard.

One possible inquiry under Local 189 United Papermakers is: What is Mrs. Grier's "rightful place" which she would have occupied but for illegal discrimination? The court cannot conclude that Mrs. Grier's "rightful place" is any higher than the place which she has attained because Mrs. Grier's advancement in the Air National Guard has been limited, not by her sex, but by the fact that she is not now, and perhaps never has been, qualified to become a member of the Air National Guard.

As pointed out by the Supreme Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, ___L.ed.2d___ (1977), plaintiff in order to establish that the defendant had engaged in a pattern and practice of racial discrimination was required "...to establish by a preponderance of the evidence that racial (here sex) discrimination was the company's standard operating procedure--the regular rather than the unusual practice." There is no evidence in this record from which the court can determine that the defendant here engaged in, or practiced as a standard operating procedure, discrimination on the ground of sex at any time.

Study of International Brotherhood of Teamsters v. United States, supra,

is also revealing in connection with the analysis of the above-styled case because there a critical fact was that after the effective date of Title VII, the defendant had continued to practice discrimination by continuing to employ only white drivers for line haul positions. There is no evidence in the case at bar that after 1972 the defendant discriminated against women in any degree.

An analysis of International Brotherhood of Teamsters, supra, reveals that an employer, by virtue of §703(h) of Title VII, 42 U.S.C. §2000e-2(h) has an obligation to avoid post-Act discrimination but does not have an obligation to root out every vestige or remnant of pre-Act segregation. Accordingly, the defendant here had no legal obligation to eliminate every lin-

gering effect of discrimination which was legal at the time it was practiced. Teamsters also establishes that even a seniority system which has the tendency to perpetuate pre-Act discrimination may be regarded as bona fide.

The case at bar, of course, does not involve a seniority system as such, but conceivably there could be an issue concerning the "bona fides" of the defendant's practices since 1972. In this connection, the court holds that the defendants have acted in good faith since 1971 in reserving the higher paid positions for persons who are subject to mobilization, and that their practice in this record is both rational and exercised in good faith.

In an effort to be certain, the court has analyzed this problem in the manner prescribed by the appel-

late courts and has attempted to apply the McDonnell Douglas analysis. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 at 800, 93 S.Ct. at 1823. It is true that the plaintiff is a member of a protected class. On the other hand, there is no evidence, in the court's judgment, that she has applied for a position for which she was qualified and been denied employment. The court's reasoning in this connection, is again predicated on the assumption that there is a fundamental difference between an Air National Guard employee who is susceptible to mobilization, and one, like Mrs. Grier, who is not. Mrs. Grier has never applied for a job in the Air National Guard in which she would be subject to mobilization, and she has not shown, at any time, that she

would have been qualified for a position in which she was subject to mobilization. The court recognizes that the McDonnell Douglas pattern is not the only means of establishing a prima facie case of individual discrimination, and the court has attempted to apply the McDonnell Douglas pattern here merely as an exercise to make certain that the court's analysis is, and has been, thorough and in accord with established law.

Of course, in the light of International Brotherhood of Teamsters, supra, it is apparent that plaintiff's failure to actually apply for membership in the Texas Air National Guard does not, in itself, mean that she is not entitled to relief. The chief fact here, however, is that Mrs. Grier

has never shown that at any particular point of time she would have been qualified to and willing to subject herself to the mobilization requirements of Guard membership.

The burden which a person, who has never applied for employment, must bear is described in the following language from Teamsters, supra:

> A non-applicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. Ct.Mt. Healthy School

District Board of Education v. Doyle, ___U.S.___, 97 S.Ct. 568, 50 L.Ed.2d 471...

Id, 431 U.S. 324, at ___.

The key to the undersigned's reasoning here is that Mrs. Grier has not proved that she would have applied for the job had the employment practices of the defendant been different.

Specific Findings of Fact

The parties in their pretrial order in this cause have listed a number of contested issues of fact. With reference to those contested issues of fact listed in the pretrial order approved by this court on the 10th day of January, 1979, the court makes the following specific findings of fact, to wit:

1. Plaintiff has been assigned to perform the same functional tasks for which males were compensated

at a higher grade, both before and after 1972; however, the action of the defendants in assigning the plaintiff to perform the same tasks does not mean that the plaintiff was performing the same "job" which males were performing because a functional task in which the performer is susceptible to mobilization is inherently and basically different from the same functional task performed by a person not susceptible to mobilization.

2. The practice of excluding females from the Texas Air National Guard was in effect until such time as Mrs. Grier was disqualified from membership because of her weight and age; however, as noted above, the plaintiff has not established

that she was qualified for membership before this date for the reasons stated above.

3. The court cannot conscientiously find and does not find in any degree that the past practice of excluding females from military membership in the Air National Guard has the present effect of discriminating against females seeking promotions to grades G-6 and higher because there is no proof before the court that any female who became a civilian employee of the Texas Air National Guard before that date upon which women were admitted to membership in the Texas Air National Guard was qualified to become a member of the Texas Air National Guard and would have

become such a member if permitted to do so. Plaintiff has produced testimony from and relating to one other lady very much like Mrs. Grier who is also a conscientious, dedicated, extremely valuable civilian employee of the Texas Air National Guard whose advancement is limited because she is not a member of the Guard. On the other hand, there is no evidence that this other woman, or any other woman situated like Mrs. Grier, would actually have joined the Texas Air National Guard and been qualified to join the Texas Air National Guard if the rules of the Guard prior to 1971 had been different. In any event, since this case is not a class action, the only female

whose case is really material is that of Mrs. Grier.

4. The court declines to find, and does not find, that the plaintiff has been denied promotion as a result of present discriminatory effects against females which result from the past practice of excluding females from military membership in the Air National Guard.

5. The court cannot hold, and does not hold, that the plaintiff has ever applied for a position for which she was qualified but not accepted. There is no credible evidence of such application.

6. Mrs. Grier, when performing the same functional task as does a Guard member, is not performing her job "under similar working

conditions" as does the Guard member because the Guard member's susceptibility to mobilization is an important "working condition."

7. Any differential in pay between Mrs. Grier and a Guard member is a differential based upon the Guard member's susceptibility to mobilization and is thus a differential based on a "...factor other than sex."

8. Plaintiff's position is no different from that of a man who went to work for the Air National Guard as a supply clerk in 1962 but who because of family commitments, unwillingness to be subject to mobilization, or inability to pass the physical examination did not become a member of the Air National Guard.

9. Defendant has demonstrated a

compelling business necessity for reserving its better paying positions for persons who are members of the Air National Guard. This necessity consists primarily in the necessity for creating a situation in which key civilian employees are subject to mobilization in the event of a national emergency.

10. Plaintiff has not established any intent to discriminate against women.

11. The policies of the defendant of which plaintiff complains are not and have never been a mere pretext to justify discrimination against women.

For the reasons stated herein, judgment will be entered for the defendant, and plaintiff's cause dismissed with prejudice.

ENTERED and EXECUTED at Houston, Texas, this the 8th day of March, 1979.

/s/ Finis E. Cowan
UNITED STATES
DISTRICT JUDGE

APPENDIX B

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful

employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Prohobition of sex discrimination

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other

factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1922

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONNA B. GRIER, PETITIONER

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT E. KOPP
SUSAN J. HERDINA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED*

1. Whether the court of appeals erred in holding that petitioner, a female civilian employee of the Texas Air National Guard who was initially hired prior to the time that the Guard accepted female members, had failed to prove a violation of Title VII of the Civil Rights Act of 1964 based on the Guard's present practice of promoting to jobs ranked at grades higher than GS-5 only those civilian employees who are also Guard members, a practice based on the Guard's military needs.

2. Whether the court of appeals erred in holding that petitioner had failed to prove a violation of the Equal Pay Act based on the fact that she was paid less than Guard member civilian employees for performing the same functional tasks when the pay differential reflected different conditions of employment and, in particular, the fact that petitioner, unlike civilian employees who are also Guard members, is not subject to mobilization.

---

*In addition to the Secretary of Defense, defendant-appellees below were the Chief of the National Guard Bureau, the Adjutant General of the State of Texas, and the members of the United States Civil Service Commission.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Corning Glass Works v. *Brennan*, 417 U.S. 188 8

Farris v. *Board of Ed. of City of St. Louis*, 576 F. 2d 765 7

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 6

Griggs v. *Duke Power Co.*, 401 U.S. 424 ..... 3, 6, 7

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 5, 6, 7

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 4

Statutes:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 3

Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16 7

Equal Pay Act of 1963, 29 U.S.C. 206 3

29 U.S.C. 206(d) 8

29 U.S.C. 206(d)(1)(iv) 4, 8

Page

Statutes—Continued:

Fair Labor Standards Act,
29 U.S.C. 203(e)(2)(A) 7

National Guard Technicians Act of 1968,
32 U.S.C. 709 2

32 U.S.C. 709(b) 2
32 U.S.C. 709(d) 2

Miscellaneous:

H.R. Rep. No. 90-1823, 90th Cong., 2d Sess.
(1968) 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1922

DONNA B. GRIER, PETITIONER

v.

CASPAR WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) and the opinion of the district court (Pet. App. A5-A39) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1980 (Pet. App. A1). A petition for rehearing was denied on January 23, 1981 (Pet. App. A3). The petition for a writ of certiorari was filed on April 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Petitioner, a female civilian employee of the Texas Air National Guard, seeks review of the decision of the court of appeals rejecting her claims that the Guard (1) discriminated against her on the basis of sex by denying her a promotion, in violation of Title VII of the Civil Rights Act of 1964, and (2) paid higher wages to male employees doing the same work as petitioner, in violation of the Equal Pay Act.

1. The Texas Air National Guard is authorized to employ two types of civilian technicians. See National Guard Technicians Act of 1968, 32 U.S.C. 709. Although the duties of some civilian technicians (such as clerk typists and supply clerks) are such that the persons holding these jobs are not required to be members of the Guard, other technicians may be required to be members of the Guard, as a condition of their civilian employment, because the positions they hold may provide the Guard with important expertise during training periods and upon mobilization. Guard positions that require concurrent Guard membership are excepted service positions (32 U.S.C. 709(b), 709(d)); all other civilian technician positions are competitive service jobs. See H.R. Rep. No. 90-1823, 90th Cong., 2d Sess. 6 (1968). The Guard has traditionally classified civilian positions graded at and above the GS-6 level as excepted service, thus limiting competitive service employees to the GS-5 level. As the district court explained, the Guard reserves the higher paid civilian employee slots for employees who are also Guard members "to create a cadre of full-time employees who devote all their working hours to the Texas Air National Guard, and who also attend meetings and summer camps, and who will provide a skeleton of experienced, fully ready personnel in the event of mobilization" (Pet. App. A11). Approximately 85% of the Guard's civilian technician positions are filled by persons who are also Guard members (*id.* at A11-A12).

2. In 1962, when petitioner was hired as a supply clerk (GS-5), women were excluded from membership in the Guard. However, the district court found that petitioner would not have joined the Guard in 1962 in any event because "[h]er family commitments militated against her placing herself in a position where she would have been susceptible to mobilization," and there was no competent evidence to show that she could have passed the physical examination at that time (Pet. App. A10). Although women have been accepted as Guard members since 1972, petitioner would not have been accepted because of her weight and age, if she had applied in 1972 (*id.* at A33). Petitioner has worked for the Guard primarily as a supply clerk, but she has also performed certain tasks entailing greater responsibility which would be compensated at a higher rate, in the range of GS-6 to GS-8 levels, if performed by a civilian employee who is also a Guard member (*id.* at A15-A16). As a non-member, however, petitioner is not eligible for advancement beyond the GS-5 level (*ibid.*).

3. Petitioner brought this action in the United States District Court for the Southern District of Texas, alleging that the Guard's practices with respect to civilian technicians violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206. First, petitioner claimed that the Guard's practice of filling civilian technician positions at and above the GS-6 level only with Guard members perpetuated past discrimination as to women who were too old to qualify for Guard membership in 1972. With respect to these women, petitioner claimed that the Guard's practice of reserving higher grades for Guard members was a facially neutral practice having a disparate impact in violation of Title VII. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). Based on the trial evidence, the district court rejected petitioner's claim, holding that she had not shown by a preponderance of the evidence that her failure to be promoted

was based on sex. The court stated (Pet. App. A24-A25): "The factor which has limited Mrs. Grier's advancement in her employment is * * * the fact that she is not a member of the Air National Guard. Her situation is exactly the same as that of a male who went to work for the Air National Guard in 1962 but because of physical incapacity or family commitments, did not become a member of the Air National Guard." Further, the district court found that the Guard had proved "a compelling business necessity" for reserving its better paying positions for persons who are members of the Guard, namely "the necessity for creating a situation in which key civilian employees are subject to mobilization in the event of a national emergency" (*id.* at A38-A39).[1]

With respect to petitioner's Equal Pay Act claim, the court found that petitioner's job was not "equal" in terms of effort or responsibility to the jobs held by the Guard members who performed the same functional tasks (Pet. App. A32-A33). The court noted that petitioner was not subject to mobilization, and thus, unlike civilian employees who were also Guard members, she was not "subject to risks, hazards, potentialities of inconvenience and disruption" of her life (Pet. App. A19). The court further held that, although petitioner was performing the same functional tasks, she was not performing her job "under similar working conditions" to those of Guard members susceptible to mobilization (Pet. App. A36-A37). Finally, the court held (*id.* at A37) that the difference between the pay received by petitioner and that received by Guard members is based upon the Guard members' susceptibility to mobilization—a factor other than sex—and thus authorized by the Equal

---

[1]The district court also held (Pet. App. A28-A30) that petitioner had not established sex discrimination through proof of disparate treatment. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Pay Act. See 29 U.S.C. 206(d)(1)(iv). The district court therefore entered judgment for respondents, and the court of appeals affirmed (Pet. App. A1-A2).

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's present grade and pay result not from discrimination of any kind, but simply from the fact that she is not a member of the Guard, which has chosen for reasons related to its vital military mission to restrict employment in higher grade civilian positions to persons who are Guard members. Women have, of course, been accepted as members since 1972, and there is no suggestion here that the Guard has discriminated against women members in making appointments to higher grade positions. No court has ever held that differentiating among persons on the basis of Guard membership violates either Title VII or the Equal Pay Act, and further review is therefore unwarranted.

1. Both courts below correctly rejected petitioner's Title VII claim because of the absence of any evidence to show that the Guard's practices had an actual disparate impact on petitioner, or, for that matter, on any other female employee who was too old to qualify for Guard membership in 1972. There is no merit to petitioner's contention (Pet. 7-9) that the decision below conflicts with this Court's decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), by requiring her to show that she would have sought to be and been accepted as a Guard member in 1962, but for her sex. In *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 367-368, the Court stated:

> A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his

> is the not always easy burden of proving that he would have applied for the job had it not been for those practices.

Further, the Court noted (*id.* at 369 n.53):

> Inasmuch as the purpose of the nonapplicant's burden of proof will be to establish that his status is similar to that of the applicant, he must bear the burden of coming forward with the basic information about his qualifications that he would have presented in an application.

Petitioner clearly failed to shoulder this burden. She put forward no evidence to show that she would have joined the Guard in 1962, if she had been permitted to do so, or that she was otherwise qualified (Pet. App. A34-A36). Moreover, there was no evidence that the Guard membership requirement perpetuated past discrimination because there was no showing that non-member women employees fared less well than non-member male employees. As the district court noted, petitioner's position is no different from that of a man who went to work as a Guard supply clerk in 1962 but who, for any number of reasons, did not become a Guard member (*id.* at A37). Thus, the courts below correctly concluded (see *id.* at A10, A31-A32, A34-A36) that a *prima facie* case of sex discrimination had not been established.[2]

---

[2]The district court, while finding that petitioner had failed to establish a *prima facie* case, also proceeded to discuss petitioner's failure to carry the ultimate burden of persuasion. Thus, even if petitioner had established a *prima facie* case of sex discrimination based on the Guard's promotion policy, the decision below is correct because the Guard clearly demonstrated a "compelling business" reason for the practice of reserving the higher grade jobs for military members (Pet. App. A37-A38). See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-432 (1971). Further, petitioner failed to show that the Guard's policy of reserving its better paying positions for members was a pretext to justify discrimination against women (Pet. App. A38). See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

Petitioner also asserts (Pet. 5-7) that the district court erred in stating (Pet. App. A27-A28) that the Guard "had no legal obligation to eliminate every lingering effect of discrimination which was legal at the time it was practiced." However, that assertion also lacks merit. As petitioner recognizes (Pet. 6-7, quoting *International Brotherhood of Teamsters* v. *United States, supra*, 431 U.S. at 349, quoting *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430), Title VII prohibits only those policies neutral on their face that "operate to 'freeze' the status quo of prior discriminatory employment practices." Here, the Guard's prior policy of excluding females from membership had been abandoned and was no longer in effect when Title VII was made applicable to the government;[3] and it cannot be said that after that date the Guard's practice of reserving the better paying jobs for military members "operate[d] to 'freeze' the status quo of prior discriminatory employment practices" against women. Since 1972, the Guard has admitted women to membership, and women have therefore been eligible for civilian technician positions at and above the GS-6 level since that time. At all events, the fact that petitioner was too old to become a Guard member in 1972 was a consequence that occured prior to the effective date of the 1972 Amendments. Title VII does not require that an employer remedy pre-Act discrimination in these circumstances (see *Farris* v. *Board of Ed. of City of St. Louis*, 576 F. 2d 765 (8th Cir. 1978)); nor does Title VII require the hiring of a person who is unqualified for the job. *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 436.

---

[3]Title VII was made applicable to federal employees, such as petitioner, in 1972. Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16. The Equal Pay Act was amended to include federal employees in 1974. Fair Labor Standards Act, 29 U.S.C. 203(e)(2)(A). See page 8, *infra*.

2. The courts below also correctly concluded that petitioner failed to show a violation of the Equal Pay Act, 29 U.S.C. 206(d), which requires that men and women be compensated equally for work that requires equal skill, effort, and responsibility, and is performed under similar working conditions. Because civilian employees who are also Guard members must maintain Guard membership as a condition of continued employment, and are thus constantly subject to possible mobilization, a non-member civilian employee's job is clearly unequal, even when he or she performs similar or identical functional tasks.

There is no merit to petitioner's contention (Pet. 9-11) that further review is warranted with respect to the finding below that the wage differential that existed between petitioner and Guard members was authorized because it was based on a factor other than sex. See 29 U.S.C. 206(d)(1)(iv). Because petitioner did not meet her burden of proving that she received lower compensation than male Guard members performing equal work, it is not necessary for this Court to consider whether respondents proved that the wage diffferential was justified. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195 (1974). In any event, petitioner's contention that the Guard's compensation practice is sex-based is no more than an attack on the factual findings of the district court, which the court of appeals affirmed, and which are supported by substantial evidence. The record shows that the Guard's policy of limiting compensation at and above the GS-6 level to military members is applicable to male and female civilian employees alike, and neutral in operation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT E. KOPP
SUSAN J. HERDINA
Attorneys

JUNE 1981

DOJ-1981-06